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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1331

STATE OF FLORIDA,

Petitioner,

v.

CHARLES WILLIS MALONE, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT STATE OF FLORIDA

AND APPENDIX

JIM SMITH
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QUESTION PRESENTED

WHETHER RESPONDENT'S SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL WAS VIOLATED BY THE ADMISSION AT TRIAL OF INCRIMINATING STATEMENTS MADE BY RESPONDENT TO HIS CELLMATE, AN UNDISCLOSED POLICE INFORMANT, BEFORE HIS ARREST OR INDICTMENT FOR THAT CRIME AND WHILE IN CUSTODY ON A SEPARATE CHARGE IN WHICH JUDICIAL PROCEEDINGS HAD COMMENCED.

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PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT
STATE OF FLORIDA

OPINION BELOW

The opinion of the Supreme Court of the State of Florida, not yet reporter, appears in the appendix hereto as "A1-15"

JURISDICTION

The Supreme Court of Florida entered its judgment on September 25, 1980. It denied a timely petition for rehearing on

December 8, 1980 and this petition for certiorari was filed within sixty days of that date (A-46). This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

WHETHER RESPONDENT'S SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL WAS VIOLATED BY THE ADMISSION AT TRIAL OF INCRIMINATING STATEMENTS MADE BY RESPONDENT TO HIS CELLMATE, AN UNDISCLOSED POLICE INFORMANT, BEFORE HIS ARREST OR INDICTMENT FOR THAT CRIME AND WHILE IN CUSTODY ON A SEPARATE CHARGE IN WHICH JUDICIAL PROCEEDINGS HAD COMMENCED.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Respondent, Charles Willis Malone, Jr., was tried and convicted in Florida on two indictments in March, 1978. The first indictment resulted from the robbery of a service station on July 14, 1977 in which Malone bludgeoned to death a service station attendant, Manuel Tanner. This indictment, filed August 17, 1977, charged Malone with robbery and first degree murder. The second indictment, filed November 2, 1977, charged Malone with the first degree murder of one Jessee Woodward and arose out of a kidnapping which occurred earlier on the same day as the service station robbery-murder. In this incident, Malone and his co-perpetrator, Freddie Lee Morris, forced the victim Jessee Woodward to accompany them on a forty mile trip to a remote,

deserted location on the outskirts of Tampa, Florida where Malone took Woodward into the marshes and shot him twice in the back of the head.

Malone was arrested for the service station robbery/Manuel Tanner murder on July 29, 1977 after evidence implicating Malone of that crime, including his fingerprints, was found in an abandoned automobile. The automobile belonged to the victim of the earlier killing, Jessee Woodward, whose body had not yet been discovered.

On September 17, 1977 after the return of the indictment for the service station robbery/Manuel Tanner murder but before Malone was either arrested or indicted for the Jessee Woodward murder, Detective Hazzard of the Pinellas County Sheriff's Department and Terry Mobley,

one of Malone's cellmates, entered into an agreement whereby Mobley was to listen for any information from Malone in regard to the Woodward disappearance. Mobley received no compensation of any sort for his services. On October 3, 1977, Mobley reported to Detective Bolle of the Pinellas County Sheriff's Department that Malone had admitted killing Woodward to him.

During the next week, Malone gave Mobley directions to find Woodward's body. These directions were given to Mobley after he and the detectives had implemented a plan wherein Mobley was transferred to the Manatee County Jail and returned on visitation day in civilian clothes under the guise of having been fully released from custody. Malone gave Mobley directions to the body in hopes that he would dispose of the remains.

However, Woodward's body could not be located by following Malone's directions even after Mobley had returned a second time for more specific directions following one unsuccessful attempt to locate it.

Finally, on October 17, 1977, a week after the last contact between Malone and Mobley, the police were led to Woodward's body by Freddie Lee Morris, Malone's co-perpetrator. The body was in the same area described by Malone in his directions.

Malone was thereafter arrested for the Woodward murder on October 20, 1977 and indicted by the grand jury on November 2, 1977. (A-20-22)

On motion by defense counsel, the Woodward murder and the service station robbery/Manuel Tanner murder were later consolidated for trial. A motion to

suppress confessions and admissions was filed by defense counsel and, following hearing, was granted in part by the trial court with regard to any statements made to Mobley concerning the Tanner murder on authority of *Massiah v. United States*, 377 U.S. 201 (1964). The trial court denied the motion to suppress with regard to all admission concerning the Woodward murder on the grounds that Malone had not been arrested nor indicted for that crime and therefore had no Sixth Amendment right to the assistance of counsel with regard to the Woodward murder at the time those admissions were made. (A-23-45)

On appeal, the Florida Supreme Court reversed Malone's conviction on authority of *United States v. Henry*, ___U.S.___, 65 L.Ed.2d 115 (1980) rendered by this Court after the completion of the briefing

schedule and oral arguments in the Court below. The Florida Supreme Court held that the admission at trial of the incriminating statements made by Malone to Mobley with regard to the Woodward murder violated Malone's Sixth Amendment right to the assistance of counsel. (A-1-15)

The Florida Supreme Court granted the State a thirty day stay of mandate with the previso that any further stays must come from this Court. A Motion for Stay of Judgment and Mandate was denied in this cause by the Honorable Lewis F. Powell, Jr., Associate Justice, on January 10, 1981. A renewed Motion for Stay of Proceedings accompanies this petition. Pursuant to Fla.R.Crim.P. 3.191,"Speedy Trial", Malone must be retried by April 14, 1981 unless proceedings in the court below are stayed pending review of this petition.

REASONS FOR GRANTING WRIT

1. THE DECISION OF THE FLORIDA SUPREME COURT IMPOSES AN EXPANDED RESTRICTION ON POLICE INVESTIGATION ACTIVITY AS A MATTER OF FEDERAL CONSTITUTIONAL LAW WHICH THIS COURT HAS SPECIFICALLY REFRAINED FROM IMPOSING THEREBY CREATING CONFLICT WITH THE SIXTH AMENDMENT RIGHT TO COUNSEL DECISIONS OF THIS COURT.

The Florida Supreme Court vacated Malone's conviction on the grounds that the introduction into evidence of Malone's incriminating statements concerning the Jessee Woodward murder deliberately elicited by a cellmate government informant violated his Sixth Amendment right to the assistance of counsel. The reversal was predicated solely upon this Court's recent decision in *United States v. Henry*, 447 U.S.___100 S.Ct. 2183, 65 L.Ed.2d 115

(1980). In *Henry*, this Court held the exclusionary principles of the Sixth Amendment right to the assistance of counsel contained in *Massiah v. United States*, 377 U.S. 201 (1964) prohibit the introduction of statements made to a cellmate government informant who deliberately elicits incriminating information from the defendant in the absence of counsel after formal judicial proceedings have commenced.[1]

In the prosecution which gives rise to the instant petition however, Malone had not been arrested or arraigned for any crime in connection with the murder of Jessee Woodward at the time he ill advisedly confided in the cellmate

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1/ This Court rendered its decision in *Henry* after the completion of the briefing schedule and oral arguments in the Florida Supreme Court, below.

informant. Malone was in custody on separate charges and the return of an indictment for the murder of Jessee Woodward was still a full month in the future. No formal charges whatsoever had been filed in connection with the Woodward case which was still in the pre-arrest investigation stages.[2] (A-20-22)

Contrary to the numerous decisions of this Court, the Supreme Court of Florida has applied the exclusionary principles of the Sixth Amendment right to counsel to require suppression of incriminating statements made before formal charges have been filed and before any critical stage of the proceedings has been reached. The Supreme Court of

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2/ Malone was in custody on charges stemming from the service station robbery/Manuel Tanner murder. The trial court granted Malone's motion to suppress statements concerning that crime based on *Massiah v. United States*. (A-17-18,45)

Florida made this ruling solely as a matter of Federal Constitutional Law. No independent state ground for the decision appears in the decision.

Although a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards, a State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them, *Oregon v. Hass*, 420 U.S. 714 (1975); *North Carolina v. Butler*, 441 U.S. 369 (1979); *Fare v. Michael C.*, 442 U.S. 707 (1979).

This Court has specifically, time and again, refrained from recognizing the existance of a Sixth Amendment right to the assistance of counsel prior to the

time that judicial proceedings have been initiated — "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); *Brewer v. Williams*, 430 U.S. 387 (1977). See *Powell v. Alabama*, 287 U.S. 45 (1932); *Moore v. Illinois*, 434 U.S. 220 (1977); *Massiah v. United States*, supra; *United States v. Henry*, supra.

Although the Supreme Court of Florida could have decided the present case under Florida law or the State Constitution, it did not do so. Neither was cited. This case was decided squarely upon the Sixth Amendment. The fact that the Florida Court based its decision upon *United States v. Henry*, supra., reveals

the federal basis.[3] C.f. *Oregon v. Hass*, supra., ["The fact that the Oregon courts found it necessary to attempt to distinguish *Harris v. New York* [401 U.S. 222 (1971)] reveals the federal basis, 420 U.S. at 719-720].

A holding by a state court that, for federal constitutional reasons, the prosecutor may not utilize otherwise relevant evidence makes the State an aggrieved party for purposes of review by this Court. Id.; see *Rhode Island v. Innis*, ___U.S.___64 L.Ed.2d 297 (1980); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Michigan v. Mosley*, 423 U.S. 96 (1975);

3/ Although the Florida Supreme Court went into great detail in explaining this Court's decision in *Henry*, not once does the decision address or even mention the important factor recognized by this Court that Henry was under indictment. (A-7-12)

California v. Green, 399 U.S. 149 (1970).

Since the Supreme Court of Florida held that *United States v. Henry* and the Sixth Amendment right to the assistance of counsel mandate the suppression of probative evidence gathered by a police agency before any formal proceedings have been initiated, the Court has expanded the federally protected right to the assistance of counsel beyond any previously recognized bounds thereby presenting this Court with a real and substantial federal question.

The Sixth Amendment right to the assistance of counsel should not be utilized as a method of denying to the State the use of probative evidence gathered before arrest or indictment since no such right exists at that time. A state court can neither add to nor subtract from the

mandates of the United States Constitution. *North Carolina v. Butler*, supra at 376. The expansion of this right to the pre-arrest/pre-indictment investigation stages conflicts with the *Henry* decision itself as well as *Massiah v. United States*, *Brewer v. Williams* and *Kirby v. Illinois*.

2. THE FLORIDA SUPREME COURT CONFUSED THE TESTS FOR DETERMINING VIOLATIONS OF THE FIFTH AND SIXTH AMENDMENTS.

The decision of the Supreme Court of Florida is succinctly stated in the following quote from the Court's opinion.

> "In light of the recent pronouncement of the Supreme Court of the United States in *United States v. Henry*, No. 79-212, 48 U.S.L.W. 4703 (June 16, 1980), we hold that Malone's incriminating statements made to the State informant while in custody in the Pinellas County jail should have been suppressed because these statements made in the absence of counsel, with no prior waiver of counsel, were directly elicited by the State's stratagem deliberately designed to elicit an incriminating statement from

> Malone. Therefore, the introduction of these statements violated Malone's sixth amendment right to the assistance of counsel."
>
> (A-7-8)

The Court held that "custody" plus "deliberately elicited" equals Sixth Amendment violation of the right to assistance of counsel.

This Court has stated that the test for determining a *Massiah* Sixth Amendment violation is whether law enforcement officers (A) deliberately elicit incriminating statements from a defendant (B) in the absence of counsel (C) after a formal charge against the defendant has been filed. *Rhode Island v. Innis*, supra, 64 L.Ed.2d at 307, n.4. In the decision under review, the Florida Supreme Court has deleted requirement (C) above and replaced it with "in custody". This is precisely what the Court cautioned

against in *Henry:*

> "11. [3b] This is not to read a "custody" requirement, which is a prerequisite to the attachment of Miranda rights, into this branch of the Sixth Amendment. Massiah was in no sense in custody at the time of his conversation with his codefendant. Rather, we believe the fact of custody bears on whether the government "deliberately elicited" the incriminating statements from Henry."
>
> (65 L.Ed.2d at 124,n.11)

Custody in such a case is not controlling. Ibid.

Custody, or more specifically, "custodial interrogation" is a Fifth Amendment term adopted by this Court in *Miranda v. Arizona,* 384 U.S. 436 (1966) to determine the period during which an accused is in need of additional procedural safeguards to protect his privilege against compulsory self incrimination. The Court recognized that custody creates a coercive "interrogation environment"

which would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination. Id., at 457-458. The concern of the Court in requiring *Miranda* warnings before custodial interrogation can begin is to counteract this coercive environment and to insure the voluntary nature of any statements rendered by an accused. *Miranda* warnings are protective devices employed to dispel the compulsion inherent in custodial surroundings. Id., at 458.

However, as the Court further noted in *Miranda*, "[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." Id., at 458.

Custody for the purposes of *Miranda*

and the Fifth Amendment serves a totally different purpose than does custody in the Sixth Amendment sense. The policies underlying the two constitutional provisions are quite distinct. *Rhode Island v. Innis*, n.4. Custody in the Fifth Amendment sense is the coercive setting which compels a suspect to incriminate himself under interrogation and effects the voluntary nature of any statement given.

For the purposes of the Fifth Amendment, this Court has held that custody for one crime is a sufficient coercive setting to require *Miranda* warnings before interrogation can begin concerning a separate crime. see *Mathis v. United States*, 391 U.S. 1 (1968).

On the otherhand, custody in the Sixth Amendment sense is important only in determining whether the government

"deliberately elicited" the incriminating statements. Custody is by no means a requirement under the *Massiah* line of cases. On the contrary, this Court has repeatedly required the initiation of formal judicial proceedings as a prerequisite to the existence of a Sixth Amendment right to counsel. Unlike custody in the Fifth Amendment sense, there is no "bleed over" effect to the investigation of other crimes when the Sixth Amendment right to counsel is at issue. The filing of formal charges on one crime does not give rise to a right to counsel for other crimes still under investigation and yet to be charged. see *Hoffa v. United States*, 385 U.S. 293, part III (1966); *United States v. Osser*, 483 F.2d 727 (3d Cir. 1973); *United States v. Merritts*, 527 F.2d 713 (7th Cir. 1975); *United States v.*

Missler, 414 F.2d 1293, 1302-1303 (4th Cir. 1969); *Vinyard v. United States*, 335 F.2d 176 (8th Cir. 1964) *cert. denied* 379 U.S. 930 (1964).

The Florida Supreme Court has confused these two distinct constitutional concepts to form a new test, predicated solely upon an erroneous interpretation of the Federal constitutional precedents of this Court, which states that the Sixth Amendment right to the assistance of counsel is violated anytime the government uses an informant who deliberately elicits incriminating statements from a person in custody without the assistance of counsel. The Court so held notwithstanding the established fact that (a) Malone conceded that these statements concerning the Woodward murder were not coerced and were voluntary (A-4); and

(b) no formal charge of any sort had been filed against Malone concerning the Woodward disappearance.

Neither the Fifth or the Sixth Amendment tests are met unless they are merged as the Florida Supreme Court has done by replacing the requirement of formal charges with a less stringent requirement of simple custody. Not mere simple custody; simple custody on other charges.

A substantial federal constitutional boundary has been transgressed by the decision of the Florida Supreme Court which needs to be rectified in order to protect a legitimate, federally recognized method of criminal investigation.

CONCLUSION

For these reasons petitioner respectfully urges this Court to grant certiorari and reverse the holding of the Supreme Court of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ROBERT J. LANDRY, Counsel for Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of February, 1981, I served three copies of the Petition for Writ of Certiorari on Samuel R. Mandelbaum, Assistant Public Defender, Counsel for Respondent, Courthouse Annex, Tampa, Florida 33602, by a duly addressed envelope with postage prepaid.

ROBERT J. LANDRY
Assistant Attorney General

A P P E N D I X

SUPREME COURT OF FLORIDA

Nos. 54,024 & 54,025

CHARLES WILLIS MALONE, JR., Appellant,

vs.

STATE OF FLORIDA, Appellee.

[September 25, 1980]

ALDERMAN, J.

Charles Willis Malone, Jr. appeals his convictions for the first degree murders of Manuel Tanner and Jessee Woodward and his sentences of death. He also appeals his conviction and sentence for robbery. We reverse.

On July 14, 1977, Jessee Woodward appeared at the residence in St. Petersburg, Florida, where Malone and his friend and co-perpetrator, Freddie Lee Morris, were staying. Three days earlier,

Malone and Morris had attempted to commit a robbery and kidnapping. They suspected that Woodward was a detective investigating those crimes, but, in fact, he was not. At gunpoint, they searched Woodward and took two dollars and a wallet from him. Then, using Woodward's automobile, they forced him to accompany them on a forty-mile trip to a remote, deserted location on the outskirts of Tampa. During this trip, Woodward pleaded for his life. When they arrived, Malone took Woodward away from the automobile into a marshy, wooded area and shot him twice in the back of his head. Then, after visiting some friends in Tampa, Malone and Morris drove around in Woodward's automobile looking for a place to rob. They finally selected a Tampa service station and, at gunpoint, robbed the attendant, Manuel

Tanner, taking fifty to sixty dollars and two hundred to three hundred packs of cigarettes. During the robbery, Malone beat Tanner to death with a blunt, pipe-like instrument. As a result of being struck on the head approximately ten times, Tanner sustained severe skull fractures, numerous fractures on the right side of his scalp and on the base of his skull, and ten lacerations on his scalp. The police later found Woodward's car parked in an apartment area in Tampa. From several items of physical evidence found in the automobile, including Malone's fingerprints, the police were able to connect Malone with Woodward's automobile and with the service station robbery.

Malone was convicted for the pre-meditated, first-degree murders of Jessee

Woodward and Manuel Tanner and the robbery of the service station. The jury recommended death sentences. The trial court sentenced Malone to death for each of the murders and to life imprisonment for the robbery.

Malone argues that his convictions should be reversed and the cause remanded for a new trial because the trial court erred in denying his motion to suppress certain incriminating statements made by him to one of his cellmates who, unknown to Malone, was an informer for the State. He concedes that these statements were not coerced and were voluntary. but argues that they may not be used against him because they were deliberately elicited by a State agent in the absence of his counsel and without his being informed of his Miranda rights by the

informant.

The informer, who was also a prisoner, first met Malone in the Pinellas County jail in September, 1977. Two and one-half weeks after meeting Malone, the informer met Detective Hazzard who asked him to assist in finding the body of Jessee Woodward by just listening to whatever Malone said about the case and reporting anything he heard about where the body was located. The informer testified that he did not ask Malone where the body was or in any way interrogate him, but he did suggest a plan to the police by which he might be able to obtain information from Malone as to where Woodward's body was hidden. The plan was to have the informer transferred to another county jail and then to have him come back and visit Malone in civilian

clothes. Prior to being transferred, the informer went back to his cell and told Malone that he was being released and assured Malone that he knew a black female attorney whom he would try to retain for Malone. Under the misimpression that the informer would be able to assist him on the outside, Malone then told the informer that he had killed Woodward, that there were several things he wanted the informer to do for him, and that he would tell the informer about them when he returned on visitation day. Some time later, dressed in civilian clothes, the informer returned to the jail, as requested by Malone. Anxious to ensure that he would not be linked with Woodward's body, Malone gave the informer directions to where the body was located and instructed the informer to

dispose of the remains. From the directions given by Malone, the police were unable to find the body. Pursuant to police directions, the informer returned to the jail and told Malone that he was unable to locate the body from the previous directions. Malone then gave more detailed directions, but the police were still unable to find the body. The co-defendant, Freddie Morris, ultimately led the police to the body, which was located in the area described by Malone in his directions to the informer.

In light of the recent pronouncement of the Supreme Court of the United States in United States v. Henry, No.79-121, 48 U.S.L.W. 4703 (June 16, 1980), we hold that Malone's incriminating statements made to the State informant while in custody in the Pinellas County

jail should have been suppressed because these statements made in the absence of counsel, with no prior waiver of counsel, were directly elicited by the State's stratagem deliberately designed to elicit an incriminating statement from Malone. Therefore, the introduction of these statements violated Malone's sixth amendment right to the assistance of counsel. Detective Carpenter testified that on several occasions he had advised Malone of his Miranda rights and had attempted to interview Malone regarding the Tanner and Woodward murders but that Malone had refused to be interviewed. It was thereafter that the ruse of the cellmate being released was concocted and employed to derive information from Malone as to the whereabouts of Woodward's body.

In United States v. Henry, the

Supreme Court held that Henry's statements to a paid police informant-cellmate were improperly admitted at trial because the government violated Henry's sixth amendment right to counsel by intentionally creating a situation likely to induce Henry to make incriminating statements without assistance of counsel. Federal agents had instructed the informant to be alert to any statements made by the federal prisoners regarding charges against them but had specifically directed him not to question Henry or the other prisoners about their charges. Distinguishing the situation before it from one where the "listening post" is an inanimate listening device having no capability of leading the conversation into a particular subject or prompting a reply and from the situation where an

informant is placed in close proximity but makes no effort to stimulate conversations about the crime charged, the Supreme Court held that the government agent in Henry was not a passive listener but had had conversations with Henry while Henry was in jail. The Court determined that Henry's incriminating statements were the product of these conversations and explained that, from the fact that the informer was paid by the government on a contingent fee basis for incriminating information, it could be assumed that he would take some affirmative steps to secure this information. Where the accused is in the company of a fellow cellmate who unbeknownst to him is acting as an informer, the Court declared, the conversation stimulated may elicit information which the accused

would not intentionally reveal to a government agent. The Court reiterated its previous pronouncement made in Massiah v. United States, 377 U.S. 201 (1964), that to have any effect, the sixth amendment must apply to indirect surreptitious interrogations. It further explained that since Henry was unaware that he was talking to a government agent, he could not be held to have waived his right to counsel. Finally, it emphasized the relevancy to its holding of the fact that at the time Henry was engaged in conversation by the government agent, he was incarcerated, and the Court stated:

> While the concern in Miranda was limited to custodial police interrogation, the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover government agents. The Court of Appeals

> determined that on this record the incriminating conversations between Henry and Nichols were facilitated by Nichols' conduct and apparent status as a person sharing a common plight. That Nichols had managed to gain the confidence of Henry, as the Court of Appeals determined, is confirmed by Henry's request that Nichols assist him in his escape plans when Nichols was released from confinement.

48 U.S.L.W. at 4706.

In the present case, the subterfuge employed by the informer and condoned and participated in by the State precipitated the incriminating statements made by Malone. During the at least month-long period of time preceding the informer-cellmate's "release," Malone had not told the informer that he had committed the murder, nor had he ever mentioned the location of Woodward's body. Not until after being informed by the cellmate of the cellmate's impending release, did

Malone confess to him that he had killed Woodward and disclose the whereabouts of the victim's body. Because of Malone's confidence which the informant had managed to gain and because Malone felt that the informer could assist him on the outside, Malone confided in the informer and enlisted, he thought, the informer's assistance in disposing of the body. Although it does not definitely appear in the record that the informer gained any benefit from the State for the disclosures he was able to obtain from Malone, it was indirect surreptitious State action which elicited Malone's incriminating statements without assistance of counsel and therefore in violation of Malone's sixth amendment right.

Reviewing the record in light of

the error of admitting these incriminating statements into evidence, we are unable to conclude beyond a reasonable doubt that the informer's testimony did not influence the jury. Chapman v. California, 386 U.S. 18 (1967). Since we conclude that this error is reversible, we find it unnecessary to resolve Malone's remaining challenges to his convictions and sentences.

Accordingly, the judgments are reversed, and this cause is remanded for a new trial.

It is so ordered.

SUNDBERG, C.J., BOYD, OVERTON, ENGLAND and McDONALD, JJ., Concur
ADKINS, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Consolidated Appeals from the Circuit Court in and for Hillsborough County,

J.C. Cheatwood, Judge, Case Nos. 77-5191 Div. "C" and 77-7178 Div. "C"

Jack O. Johnson, Public Defender, and Wayne Chalu and Samuel Robert Mandelbaum, Assistant Public Defenders, Tampa, Florida,

for Appellant

Jim Smith, Attorney General, and C. Marie King, Assistant Attorney General, Tampa, Florida,

for Appellee

WARRANT

THE COUNTY COURT IN AND FOR
HILLSBOROUGH COUNTY, STATE OF FLORIDA

STATE OF FLORIDA) To all and singular
) the sheriffs of the
COUNTY OF HILLSBOROUGH) State of Florida

Whereas I. Carpenter, TPD has this day made oath before me that on or about the 14th day of July, A.D. 19 77, in the County aforesaid, one
Charles Willis Malone, Jr. Did unlawfully and from a premditated (sic) design to effect the death of Manuel Tanner, did murder Manuel Tanner by beating him to death with a blunt object,

contrary to the statute in such cases made and provided, against the peace and dignity of the State of Florida.

These are therefore to command you to arrest Charles Willis Malone, Jr. the said defendant and bring him before me to be dealt with according to law.
Given under my hand and official seal this 29th day of July A.D. 19 77.
Initiating Agency TPD

F.S. X M.O.
Inside Tampa City Limits Yes No.

/S/ Thomas A. Miller, Sr.
JUDGE OF THE COUNTY COURT

OSP-6-73

THE 17TH DAY OF AUGUST, 1977 : CASE NO.
: 77-5191
THE STATE OF FLORIDA : DIVISION C

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the County of Hillsborough, State of Florida, charge that CHARLES WILLIS MALONE, JR. on the 14th day of July, 1977, in the County and State aforesaid, unlawfully and from a premeditated design to effect the death of MANUEL TANNER did murder the said MANUEL TANNER by striking him with a blunt instrument, a more detailed description of which blunt instrument is to the Grand Jurors unknown, contrary to the form of the Statute in such cases made and provided, to-wit: Florida Statute 782.04, and

SECOND COUNT

The Grand Jurors of the County of Hillsborough, State of Florida, charge that CHARLES WILLIS MALONE, JR. on the 14th day of July, 1977, in the County and State aforesaid, did unlawfully, by force, violence, assault or putting in fear, rob, steal and take away from the person or

custody of MANUEL TANNER certain property, to-wit: cash and cigarettes, a further description of which is to the Grand Jurors unknown, the said CHARLES WILLIS MALONE, JR. not being the true owner of the said property, and in the course of committing the robbery did carry a deadly weapon, to-wit: a blunt instrument, a further description of which is to the Grand Jurors unknown, contrary to the form of the Statute in such cases made and provided, to-wit: Florida Statute 812.13.

* * * * * * * * * * * * * * * * * * * *

INDICTMENT FOR FIRST DEGREE MURDER
and
ROBBERY

* * * * * * * * * * * * * * * * * * * *

A TRUE BILL:

/S/ Julian R. Sanders
Foreman of the Grand Jury

A NO TRUE BILL:

_____
Foreman of the Grand Jury

I. E. J. SALCINES, State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, State of Florida, do hereby aver, as authorized and required by law, that I have acted in an advisory capacity to the Grand Jurors of Hillsborough County previous to their returning the above indictment in the above-styled causes.

by : /S/ Charles T. Davidson
for: E. J. SALCINES, STATE ATTORNEY

Presented before /S/ Neill McMullen
Circuit Judge

WARRANT

THE COUNTY COURT IN AND FOR
HILLSBOROUGH COUNTY, STATE OF FLORIDA

STATE OF FLORIDA) To all and singular
) the sheriffs of the
COUNTY OF HILLSBOROUGH) State of Florida

Whereas Det. I. Carpenter, TPD has this day made oath before me that on or about the 14th day of July, A.D. 19 77, in the County aforesaid, one
Charles Willis Malone, Jr. did unlawfully and from a premeditated design to effect the death of Jesse (sic) W. Woodward, did murder Jessie (sic) W. Woodward by shooting with a 32 cal. Pistol,

contrary to the statute in such cases made and provided, against the peace and dignity of the State of Florida.

These are therefore to command you to arrest Charles Willis Malone, Jr. the said defendant and bring him before me to be dealt with according to law.
Given under my hand and official seal this 19th day of October A.D. 19 77.
Initiating Agency TPD

F.S. X M.O.
Inside Tampa City Limits Yes No
X

/S/ Henry Wilson
JUDGE OF THE COUNTY COURT

COSP-6-73

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

THE 2ND DAY OF NOVEMBER, 1977.

THE STATE OF FLORIDA : CASE NUMBER
77-7178
VS :

CHARLES WILLIS MALONE, JR. : DIVISION C

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the County of Hillsborough, State of Florida, charge that CHARLES WILLIS MALONE, JR. on the 14th day of July, 1977, in the County and State aforesaid, unlawfully and from a premeditated design to effect the death of JESSIE (sic) WILBUR WOODWARD did murder the said JESSIE (sic) WILBUR WOODWARD by shooting him with a pistol, a more detailed description of which is to the Grand Jurors unknown, contrary to the form of the Statute in such cases made and provided, to-wit: Florida Statute 782.04.

* * * * * * * * * * * * * * * * * * *
INDICTMENT FOR FIRST DEGREE MURDER
* * * * * * * * * * * * * * * * * * *

A TRUE BILL:

/S/ James R. Boyer
Foreman of the Grand Jury

A NO TRUE BILL:

Foreman of the Grand Jury

I, E. J. SALCINES, State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, State of Florida, do hereboy aver, as authorized and required by law, that I have acted in an advisory capacity to the Grand Jurors of Hillsborough County previous to their returning the above indictment in the above-styled cause.

/S/ Norman S. Cannella, Ast. S. A.
for E. J. SALCINES, STATE ATTORNEY

Presented before /S/ Robert W. Patton
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR THE COUNTY OF HILLSBOROUGH AND STATE OF FLORIDA

CRIMINAL JUSTICE DIVISION

THE STATE OF FLORIDA	:	
vs	:	No.77-5191-Div. C No.77-7178-Div. C
CHARLES WILLIS MALONE	:	

This cause came on for hearing on pre-trial motions before the Honorable C. J. Cheatwood, Judge, on March 3, 1978, as follows:

Appearances:

HONORABLE THOMAS DAVIDSON, Assistant State Attorney, for the State;

RICHARD A. LAZZARA, ESQUIRE, 401 Governor Street, Tampa, Florida, appearing in behalf of the Defendant.

P R O C E E D I N G S

(March 3, 1978, Friday,
8:00 o'clock a.m.)

THE COURT: All right, Gentlemen, let the record reflect that after we recessed last night that counsel and the Court listened to the tapes of Mr. Mobley's statement in Chambers, and I will ask the Clerk to please place these tapes in evidence as Court Exhibit #1. The Court has also read the statement of Ann Morehead Hardin and Freddie Lee Morris, the desposition of Ruby Staley, Canetha Strong, Jacqueline Williams, CraigSmith, Terry Mobley and Lamar Larry.

All right. You may proceed, sir.

MR. LAZZARA: Judge, you would want to now hear arguments on the motion to suppress confessions and statements, statements made by my client to Mr. Mobley?

THE COURT: That will be fine, sir.

MR. LAZZARA: Judge, in addition to the - - well, in this motion, Judge, I am relying not only on the Miranda case, the Fifth Amendment and Sixth Amendment and the Fourteenth Amendment, but also a case called Massiah versus United States, decided by the United States Supreme Court in 1964 and cited at 84 Supreme Court Reporter, 1199. The facts in the Massiah case, Judge, reveal that Mr. Massiah was arrested, indicated, arraigned, pled not guilty and had the services of an attorney. There was a co-Defendant in the case and a few days later, without the knowledge of Mr. Massiah, this co-Defendant decided to cooperate with the United States Government in their continuing investigation of the activities in which the Defendant Mr. Massiah and the co-Defendant and others had been involved. The co-Defendant allowed an agent of the United States Government to place a transmitting device in his automobile, by means of which the agent could overhear any

conversations in the car, even though he was stationed in an automobile somewhere else.

One night Mr. Massiah and the co-Defendant had a lengthy conversation in the co-Defendant's car by a prearrangement with the Government agent, and unknown to the Defendant Mr. Massiah the agent, in another automobile, was able to overhear the conversation. Naturally, Mr. Massiah made certain incriminating statements which were later introduced at his trial over strenuous objection and, quite naturally, he was convicted.

The Supreme Court, Judge, in holding that activity was impermissible stated, and I would like with the Court's indulgence, to read some of the language of the case:

"We hold that the Petitioner was denied the basic protection of that guarantee when there was used against him at his trial evidence of his own incriminating words which Federal agents have deliberately elicited from him before he

had been indicted in the absence of his counsel. It is true in the Spano case the Defendant was interrogated in the Police Station, while we are here the damaging testimony was elicited from the Defendant while he was on bail."

So you know, Judge, the Court of Appeals confirmed the trial court's conviction of Mr. Massiah, and part of the dissent, one of the judges, Judge Hayes, stated as follows:

"If such a rule is to have this nature it must apply to this direct and surreptitious interrogation as well as those conducted in the jail house."

In this case Massiah was more seriously imposed upon because he did not even know that he was under interrogation by a Government agent and then finally, Judge, the Court in conclusion states:

"We do not question in this case, as in many cases, it was entirely proper to conduct an

investigation of a suspected criminal activity of the Defendant and his alleged confederates, even though the Defendant had already been indicted. All that we hold is that the Defendant, on incriminating statements obtained by Federal agents, under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial."

Judge, I would submit to you that the facts in this case, Mr. Malone's case, are on all fours with the facts in Mr. Massiah's case. The record is clear Mr. Malone was indicted in Case Number 77-5191 August 19th, 1977. On August 19th, 1977, he was arraigned, pled not guilty and had the services of an attorney. The court file will reflect it was Mr. Starke, who was with the Public Defender's Office. The record is also clear that this was before Mr. Terry Mobley entered the picture, which was, according to his testimony, he was approached, I think, four days

after he was sentenced in Pinellas County on September 13th, 1977.

I think the record is also clear, Judge, that Mr. Mobley was assisting the State of Florida and for all intents and purposes was an agent of the State of Florida, and that the Defendant had no knowledge of this whatsoever.

I think the record is clear that just as in the Massiah case the State was engaging in a continuing investigation of the Defendant's criminal activities. Recall the tape of Mr. Mobley, Judge, that you heard last night. Detective Hazzard not only advised him of the particulars of the Woodward murder, Case Number 77-7178, but he also advised him about the service station robbery and how the other man was killed.

Additionally, Judge, I would submit to you that taking all the evidence into consideration, Mr. Mobley's testimony here yesterday and the testimony of Detective Bolle and that tape-

recorded conversation of Mr. Mobley, that Mr. Mobley is not just a person sitting back and listening but rather is a person who was taking affirmative steps to draw information out of Mr. Malone, and in that regard, Judge, I would like to refresh the Court's recollection as to what it heard on the tape last night. I think we heard Mr. Mobley say that psychology had to be worked on the Defendant since he was distrustful. I think we heard how he decided to exploit the ethnic angle in order to gain the Defendant's confidence, how he created a fictitious black female lawyer to gain the Defendant's confidence, how he was working on an angle where he was going to tell Mr. Malone that this supposed lawyer had gone through his case and there was no way in hell and Judge, I remember those words, there was no way in hell he would do anything or she could do anything unless Charles told where the body was, and remember, Judge, he stated he realized that

this was bold and very up front but he felt it was going to work, and remember how he also explained that he felt that if someone went to Mr. Malone and said, "Hey, you don't have to tell where the body is," then he felt Mr. Malone would go free.

There is one other important part here, Judge, that I wanted to bring out. One of the other things Mr. Mobley was working on, if I recall that tape correctly, Judge, was to try and get it across to Charles that if he cooperated with him, meaning Mr. Mobley, and cooperated with this supposed lawyer then if he got sentenced it would be a life sentence and I remember that, Judge, and remember he stated the main thing that Charles was worried about was the sentencing aspect.

Remember also, Judge, the situation involving the taking of Mr. Mobley from the Pinellas County Jail to the Manatee County Jail under the ruse that he was being freed. Mr. Mobley told us

yesterday Mr. Malone was led to believe, "I was being freed." It is just part of the overall plan to get him to open up to him and then he is brought back. I believe Detective Bolle stated on three or four occasions he was brought back and each time that Mr. Mobley received information which, in a sense, doesn't pan out for whatever reason, he is taken back to Mr. Malone to get better information, and if you will recall, Judge, on one occasion Mr. Mobley is wired for sound, so to speak.

I submit to you, Judge, these are not the actions of a person, which is what I think the State wants to lead you to believe, of a person who is sitting back and doing nothing but listening. These are the actions of a person who I would submit to you is taking affirmative steps to elicit incriminating information from Mr. Malone, who was a key suspect from the very beginning.

I submit to you, Judge, what the State was trying to do -- excuse me -- I submit to you that the State was trying to do indirectly what they could not do directly because, as the record reflects, Detective Carpenter and Detective Hazzard attempted to interrogate Mr. Malone regarding these crimes, but after advising him of his Constitutional rights regarding self-incrimation and a right to counsel, he invoked those rights.

So I would submit to you what the police did, Judge, was they attempted and were, I think, successful in eliciting incriminating statements from my client in a surreptitious, illegal manner. Judge, I would say to you that I feel on the record that has been presented to this Court, the Court under Miranda, under Massiah, under the Fifth, Sixth and Fourteenth Amendments, must suppress all statements given by my client to Mr. Mobley. At the very least, Judge, the Court must suppress under Massiah any statements given

by my client to Mr. Mobley relating to the service station robbery and murder, which is Case Number 77-5191. Judge, then I have a copy of the Massiah case if you would like to read it.

THE COURT: Yes, sir.

MR. LAZZARA: I would like to point out one thing to show you so you don't think I am misleading you. The Court in there makes reference to them dealing with a Federal case, Federal conviction, where the specific gurantee of the Fifth Amendment directly applies. I think the law is well settled that the Fifth and Sixth Amendment of the United States Constitution are applicable in the State's prosecution through the Fourteenth Amendment. Thank you, Judge.

THE COURT: All right, Mr. Davidson?

MR. DAVIDSON: Yes, Your Honor. Your Honor, I believe Mr. Lazzara, his final statement, hit on the key to this whole situation when he mentioned to the Court that the Court should at

least suppress any statements made concerning the Tanner service station robbery and, I believe, Mr. Lazzara must have made that comment to the Court because he is well aware after having read the Massiah case that the Massiah case clearly applies only in a post-indictment situation. In some of the remarks that Mr. Lazzara read from that opinion, I think it is clear within that particular case itself, that they are talking about only a situation where a Defendant has been indicted for the crime which is currently under investigation.

Now just so the record is clear, I want the Court to understand that the State will not try to mislead the Court as to the facts of this case and as to why Mr. Mobley was sent in and what Mr. Mobley was doing when he was talking with Mr. Malone. However, we do have a little bit different understanding of these facts based on the testimony that has been presented to the

Court yesterday. I believe that based on these facts, Your Honor, there is a difference between that tape where Mr. Mobley was discussing in an office situation with Detective Bolle possible courses of action and plans and so forth and in talking with Mr. Malone in the actual discussion that took place.

Mr. Mobley was here himself yesterday as was Detective Bolle, and they both testified as to what Mr. Mobley was to do and as to what Mr. Mobley actually did when he was talking to Charles Malone. Also, the Court has a transcript of Detective Hazzard where he also indicates what Mr. Mobley's purpose was, and one thing that stands out clear, clearly in all that testimony, is that Mr. Mobley was there to determine where the body of Jesse Woodward was located and Mr. Malone here had neither been arrested nor indicated during the whole course or whole period of time during which Mr. Mobley was talking with

him, after having talked with Detective Hazzard and Detecitve Bolle.

There were, as the Court recalls, from the tapes some comments made about the service station robbery, but I don't believe they were elicited by Mr. Mobley nor was Mr. Mobley instructed to find out information about the service station robbery. Of course, Detective Hazzard did brief, in general, Mr. Mobley about that robbery and I believe it is indicated in the testimony the purpose of that was so he would have a background on the man he was talking to.

Now rather than asking the Court to rely strictly on Massiah, Your Honor, as to the key points in this situation as to whether or not the Massiah applies only to a post-indictment situation, I would cite to the Court Procunier versus Atchley, U.S. Supreme Court case decided in January, 1971, several years after the Massiah case. Your Honor, I submit to the Court that

this case goes further than Massiah and is more closely on point with the facts faced by the Court here today. In that case a California man had been arrested, Your Honor, for the murder of his wife, and as the Court recalls Mr. Malone here had not even been arrested for the death of Jesse Woodward. This California man was arrested for the shooting of his wife. An insurance man went to visit the Defendant in jail concerning insurance matters involving the death of the California man's wife. During the course of their discussion this Defendant made certain incriminating statements to the insurance man. This insurance man, after the conversation, went to the police authorities and reported what he was told and the police authorities asked him to go back in and talk to this Defendant again and see if he could learn anything else about the murder, and he was wired for sound. He had a tape recording device on his person, which not

only picked up his conversation, as in our set of facts, but also picked up the conversation of the accused. All of this being prior to the indictment on the murder case. During that conversation the Defendant again made incriminating statements. These statements were subsequently introduced into evidence at the Defendant's trial and he was subsequently convicted. The U. S. Supreme Court in considering this matter through a petition for writ of habeas corpus advised that these facts on their face did not set out enough reason for them to find that the Massiah or Miranda rules had been violated and they specifically discussed the fact that this was a pre-indictment situation.

THE COURT: The case you are making reference to, Mr. Davidson, the man had been arrested but not yet indicted at the time he was interviewed by the insurance agent?

MR. DAVIDSON: That is correct, Your Honor.

THE COURT: All right.

MR. DAVIDSON: Now if I may, Your Honor, with the Court's indulgence, quote from this particular decision:

"Defendant also contends that the recording was obtained by such fraud that its use as evidence is inconsistent with due process relying primarily on the Supreme Court case of Larry versus Dino. Although there was a similar deception in a present case there was no comparable mental coercion. Deception itself does not render Defendant's statements inadmissible, for it was not of the type reasonably likely to procure an untrue statement."

Now I will direct the Court's attention to Mr. Mobley's testimony yesterday where he advised that his intention was not to elicit untrue statements. What he did was to gain true statements. He was there to find the location of the body of Jesse Woodward. That was the whole purpose. So it would stretch the

imagination that he would be doing anything to elicit an untrue statement about the location of the body, and I also believe he testified in detail that he did nothing to coerce Mr. Malone into making the statements involved. In fact, I think the tape recording that the Court listened to and the testimony indicates that, in fact, Mr. Malone elicited the aid of Mr. Mobley. Your Honor, I have a copy of this particular Supreme Court case. I don't recall if I cited the case to the Court, but it is at 524, U.S. Supreme Court Reporter -- excuse me, Your Honor, I am reading the wrong citation. It is 400 U.S. 446, 27 Law Ed., 524, 91 Supreme Court 485. Your Honor, I have a copy of that case if the Court wishes to look at it. I do have some annotations on it.

Now, Your Honor, there is further case law in Florida going to the same point where the Florida Courts recognize that the techniques used by the officers in this case were violative of

the Constitutional rights that Mr. Lazzara mentioned only in post-indictment situations or post-filing of the Information. I cite to the Court Dismukes versus State, 327 Southern Second, 201, and Robinson versus State, 351 Southern Second, 1100. In that case the Court says we find the reliance upon Massiah misplaced because Massiah applies only to a Defendant who has been indicted or informed against. This is November 8th, 1977, decision, Your Honor. Again Sikes versus State, Second District case, 313 Southern Second, 436, wherein the Court specifically affirms and says that the behavior used, which was similar in the case at hand, was founded upon post-indictment confessions. So, Your Honor, in conclusion, I would only urge the Court to understand that these officers were dealing with a situation where they had to reach some solution to a problem. They couldn't wait for Massiah to be taken a step further in the direction that Mr.

Lazzara would want it to go. They couldn't wait for the Atchley case to be reversed. They had to act on the law as they understood it to be at the time they reached the solution to their problem. We are dealing here at a trial level, not appellate level, and these officers, I believe, have to be able to act on the law as it stands at the time they are dealing with the particular problem they have, and I believe that the cases that the State has cited to the Court make it clear their actions were well within the law, within the laws stated by the U.S. Supreme Court, and to knowledge, that is the latest word on this particular kind of situation.

I join with Mr. Lazzara in saying that in a post-indictment situation there is no question that these officers could not have done the things that they did in talking to Mr. Malone, but we are not dealing with a post-indictment situation. We are not even dealing with a post-arrest situation.

Mr. Mobley was specifically instructed not to delve into the matters involving the Tanner case, and it is clear from the evidence presented that he was seeking only to learn about Mr. Woodward's body and its whereabouts, and of course, the admissions made to him were concerning the body and his involvement in the death of Jesse Woodward. For these reasons the State would urge the Court to apply the law as it is stated in the Florida cases that the State has cited and in the Atchley case.

THE COURT: All right. Any response, Mr. Lazzara?

MR. LAZZARA: Just so the record is clear, I don't know if I brought it out, I am not relying solely and exclusively on Massiah. I am also relying on Miranda and the principles of the Fifth, Sixth and Fourteenth Amendments.

THE COURT: Which is the Tanner file, please, Miss Clerk, the number?

THE CLERK: 5191

THE COURT: Gentlemen, I appreciate the arguments of counsel. I think they have been helpful to the Court. I hope so, and in an abundance of caution, I am going to grant the motion but only insofar as it applies to the Tanner case which is 77-5191. The reason for the Court's ruling being that the indictment had been handed down in the Tanner case. The Defendant had been arraigned, entered a not guilty plea, and since there is some trepidation in the Court's mind of statements made by the Defendant to the witness, I will grant the motion to suppress only any statements made pertaining to Case Number 77-5191.

SUPREME COURT OF FLORIDA

Monday, December 8, 1980

CHARLES WILLIS MALONE, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case Nos. 54,024 & 54,025
Circuit Court Nos. 77-5191 Div. "C" & (Hillsborough) 77-7178 Div. "C
CONSOLIDATED CASES

Upon consideration of the Petition for Rehearing filed in the above stylec cause by the attorney for Appellee, and response thereto,

IT IS ORDERED that said Petition be and the same is hereby denied.

SUNDBERG, C.J., BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur ADKINS, J., dissents.

A True Copy
TC
TEST:
cc: Hon. James F. Taylor, Jr.,Clerk
Hon. J. C. Cheatwood, Judge
James S. Purdy, Esquire
Samuel Robert Mandelbaum, Esquire

Sid J. White
Clerk, Supreme Court
By: /s/ Tanya Carroll
Deputy Clerk